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No. 71-1002

In the Supreme Court of the United States

OCTOBER TERM, 1971

RICHARD D. LAMM, PETITIONER

v.

JOHN S. VOLPE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner, as a Colorado state taxpayer and as a member of the Colorado Legislature, seeks a declaratory judgment that sub-sections 131(g) and 131(n) of the Highway Beautification Act of 1965, 23 U.S.C. 131, are an unconstitutional usurpation of the state's police power to remove highway billboards without paying compensation to the owners. The district court granted summary judgment for the defendants

John S. Volpe, Secretary of Transportation, John N. Mitchell, Attorney General, and Frank C. Turner, Federal Highway Administrator (Pet. 19). The Court of Appeals for the Tenth Circuit affirmed (Pet. App. I, pp. 47-64), primarily on the grounds of lack of standing to sue and mootness.[1]

Petitioner argues that the states are deprived of their inherent police powers to control and remove billboards without paying compensation by Section 131, which provides that federal highway funds allocated to a state which does not have a program for the "effective control" of billboards are to be reduced by ten percent. 23 U.S.C. 131(b). As Section 131(g) provides that the states must pay a share of "just compensation" to signowners and the owners of the land from which signs are removed, petitioner fears that state action to remove billboards without paying compensation will result in a determination that the state lacks a program for "effective control" of billboards within the meaning of Section 131(b) and thus will subject the state to a 10 percent reduction in federal highway funds. Since the filing of this lawsuit, the state of Colorado has enacted a compensation statute in compliance with Section 131 (Pet., pp. 37-38).

Thus petitioner's argument essentially is that in enacting a statute which provides for a 10 percent

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[1] The court, quoting from *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143, also drew attention to Congress' power to "fix the terms upon which its money allotments to states shall be disbursed." Pet. App. I, p. 54.

reduction in highway funds unless the states agree to pay a share of compensation for billboard removal, Congress has coerced the states into paying compensation for billboard removal despite the fact that the states could, in the exercise of their police powers, control billboards without paying compensation. Thus, petitioner contends, Congress is forcing him as a state taxpayer to make unneeded expenditures in violation of the Tenth Amendment, and preventing him from carrying out his duties as a state legislator.

The petition for a writ of certiorari should be denied. First, there is no case or controversy involved; second, petitioner has no standing to sue; and third, even if petitioner were properly before the Court, his claim that portions of the Highway Beautification Act are unconstitutional is insubstantial.

1. Petitioner seeks an advisory opinion in a hypothetical context. Federal funds for state highway construction cannot be reduced unless and until the Secretary of Transportation has determined that the state has failed to provide for "effective control" of highway billboards, 23 U.S.C. 131(b). No such determination has been made, nor is it likely that it will be made, since Colorado has enacted a "just compensation" statute in compliance with all requirements of Section 131(g). Even if the Colorado legislature should change its policy with respect to the payment of compensation for billboard removal and enact a program for the removal of billboards without compensation, if the Secretary of Transporta-

tion then determines that funds should be reduced pursuant to Section 131(b), the State is entitled to an administrative hearing before any order reducing funds is entered, and to a court test of such an order before it can be enforced. 23 U.S.C. 131(l).

In sum, the prospect that, first, Colorado will enact a statute to control billboards without paying compensation, and second, that if Colorado does so, the Secretary of Transportation will reduce its share of highway funds by 10 percent, is too remote at this time to present a justiciable case or controversy. *United Public Workers* v. *Mitchell*, 330 U.S. 75, *Poe* v. *Ullman*, 367 U.S. 497.

2. Petitioner lacks standing to bring this action. Congress provided an administrative remedy available only to states aggrieved by a proposed reduction in their highway funds because of failure to provide effective control of billboards. 23 U.S.C. 131(l). The theories advanced by petitioner to support his standing to sue are unavailing. While in some instances—*i.e.*, a challenge to the validity of the Kansas Legislature's vote to ratify a Constitutional amendment, *Coleman* v. *Miller*, 307 U.S. 433—this Court has upheld the standing of a state legislator to sue to vindicate "a plain, direct, and adequate interest" (307 U.S. at 438), here there is no act of the state legislature upon which petitioner can base his claim for standing. Similarly, as a taxpayer petitioner can not establish the mandatory "nexus" between his status as a taxpayer and a constitutional limitation imposed upon the taxing and

spending power of Congress. *Flast* v. *Cohen*, 392 U.S. 83. Rather, he relies on the same generalized standing contention rejected by this Court in *Frothingham* v. *Mellon*, 262 U.S. 447.

3. In any event, petitioner's underlying claim is without merit, since it is settled that the federal government can impose reasonable conditions upon a state's receipt of federal grants. In *Oklahoma* v. *United States Civil Service Commission*, 330 U.S. 127, which stemmed from a grant of federal highway aid, the state objected to the enforcement of Section 12 of the Hatch Act against a member of its Highway Commission. Rather than removing him as the Hatch Act required, the state instituted judicial proceedings, contending that the penalty provisions of the Act invaded state sovereignty by providing for either forfeiture of state office or financial penalties against the state. This Court rejected that argument, holding (330 U.S. at 143):

> * * * While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.

In this case, Congress, in aid of its admitted power to regulate advertising along interstate highways, has conditioned its grant of funds for construction of highways upon state aid in the removal of billboards, including payment of just compensation. This reasonable restriction upon the allotment of highways funds in no way infringes upon Colo-

rado's rights under the Tenth Amendment (*United States* v. *Darby*, 312 U.S. 100, 123-124), to control or remove highway billboards.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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